

105TH CONGRESS
2D SESSION

H. R. 3891

To amend the Trademark Act of 1946 to prohibit the unauthorized destruction, modification, or alteration of product identification codes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 19, 1998

Mr. GOODLATTE introduced the following bill; which was referred to the
Committee on the Judiciary

A BILL

To amend the Trademark Act of 1946 to prohibit the unauthorized destruction, modification, or alteration of product identification codes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Trademark
5 Anticounterfeiting Act of 1998”.

6 **SEC. 2. PROHIBITION AGAINST UNAUTHORIZED ALTER-**
7 **ATION OF PRODUCT IDENTIFICATION CODES.**

8 (a) IN GENERAL.—Title VIII of the Act entitled “An
9 Act to provide for the registration and protection of trade-

1 marks used in commerce, to carry out the provisions of
 2 certain international conventions, and for other pur-
 3 poses.”, approved July 5, 1946 (commonly referred to as
 4 the “Lanham Act” and the “Trademark Act of 1946”)
 5 is amended by inserting after section 43 (15 U.S.C. 1125)
 6 the following:

7 “UNAUTHORIZED MODIFICATIONS OF PRODUCT
 8 IDENTIFICATION CODES

9 “SEC. 43A. (a) DEFINITIONS.—In this section—

10 “(1) the term ‘consumer’—

11 “(A) means—

12 “(i) the ultimate user or purchaser of
 13 a good; or

14 “(ii) any hotel, restaurant, or other
 15 provider of services that must remove or
 16 alter the container, label, or packaging of
 17 a good in order to make the good available
 18 to the ultimate user or purchaser; and

19 “(B) does not include any retailer or other
 20 distributor who acquires a good for resale;

21 “(2) the term ‘good’ means any article, product,
 22 or commodity that affects interstate or foreign com-
 23 merce and that is customarily produced or distrib-
 24 uted for consumption by individuals or use by indi-
 25 viduals, and any container, packaging, label, or com-
 26 ponent thereof;

1 “(3) the term ‘manufacturer’ includes the origi-
2 nal manufacturer of a good and a duly appointed
3 agent or representative of that manufacturer acting
4 within the scope of its agency or representation;

5 “(4) the term ‘product identification code’—

6 “(A) includes any number, letter, symbol,
7 mark, date (including an expiration date), code,
8 software, or other technology that is affixed to
9 or embedded in any good, by which the manu-
10 facturer may trace a product back to a particu-
11 lar production lot or batch or date of removal,
12 or otherwise identify the source of the product;
13 and

14 “(B) does not include copyright manage-
15 ment information conveyed in connection with
16 copies or phonorecords of a copyrighted work or
17 any performance or display of a copyrighted
18 work;

19 “(5) the term ‘Universal Product Code’ refers
20 to the multidigit bar code and number representing
21 goods in retail applications; and

22 “(6) the term ‘value’ means the face, par, or
23 market value, whichever is the greatest.

24 “(b) PROHIBITED ACTS.—Except as otherwise au-
25 thorized by Federal law, it shall be unlawful for any per-

1 son, other than the consumer or the manufacturer of a
2 good, knowingly and without authorization of the manu-
3 facturer—

4 “(1) to directly or indirectly alter, conceal, re-
5 move, obliterate, deface, strip, or peel any product
6 identification code affixed to or embedded in any
7 good;

8 “(2) to directly or indirectly affix or embed a
9 product identification code to or in that good which
10 is intended by the manufacturer for a different good,
11 such that the code no longer accurately identifies the
12 source of the good;

13 “(3) to directly or indirectly affix to or embed
14 in that good any number, letter, symbol, mark, date,
15 code, or other technology intended to simulate a
16 product identification code; or

17 “(4) to import, export, sell, distribute, or broker
18 that good, the product identification code for which
19 has been altered, concealed, removed, obliterated, de-
20 faced, stripped, peeled, affixed, or embedded in viola-
21 tion of paragraph (1) or (2), or that bears an unau-
22 thorized number, letter, symbol, mark, date, or other
23 code in violation of paragraph (3).

24 “(c) APPLICABILITY.—The prohibitions set forth in
25 subsection (b) shall apply to product identification codes

1 (or simulated product identification codes with respect to
2 subsection (b)(3)) affixed to, or embedded in, any good
3 held for sale or distribution in interstate or foreign com-
4 merce or after shipment therein, including any good held
5 in a bonded warehouse designated under section 555 of
6 the Tariff Act of 1930 or in a foreign trade zone estab-
7 lished under the Foreign Trade Zones Act.

8 “(d) EXCLUSION.—Nothing in this section prohibits
9 a retailer from affixing a Universal Product Code or other
10 electronic pricing code to a good if that code does not (or
11 can be removed so as not to) permanently alter, conceal,
12 remove, obliterate, deface, strip, or peel any product iden-
13 tification code.

14 “(e) CRIMINAL PENALTIES.—Any person who know-
15 ingly violates this section shall be punished as provided
16 in section 1365A of title 18.

17 “(f) CIVIL REMEDIES.—

18 “(1) IN GENERAL.—Any person who is injured
19 by a violation of this section, or threatened with
20 such injury, may bring a civil action in an appro-
21 priate United States district court against the al-
22 leged violator.

23 “(2) IMPOUNDING AND DISPOSITION OF
24 GOODS.—In any action under paragraph (1), the
25 court may—

1 “(A) grant 1 or more temporary, prelimi-
2 nary, or permanent injunctions on such terms
3 as the court determines to be reasonable to pre-
4 vent or restrain the violation;

5 “(B) at any time while the action is pend-
6 ing, order the impounding, on such terms as
7 the court determines to be reasonable, of any
8 good that is in the custody or control of the al-
9 leged violator and that the court has reasonable
10 cause to believe was involved in the violation;
11 and

12 “(C) as part of a final judgment or de-
13 cree—

14 “(i) order the destruction of any good
15 involved in the violation that is in the cus-
16 tody or control of the violator or that has
17 been impounded under subparagraph (B);
18 or

19 “(ii) if the court determines that any
20 good is not unsafe or a hazard to health,
21 dispose of the good by delivery to such
22 Federal, State, or local government agen-
23 cies as, in the opinion of the court, have a
24 need for such good, or by gift to such char-
25 itable or nonprofit institutions as, in the

1 opinion of the court, have a need for such
2 good, if such disposition would not other-
3 wise be in violation of law, and if the man-
4 ufacturer consents to such disposition and
5 is given the opportunity to recode the
6 good.

7 “(3) DAMAGES.—

8 “(A) IN GENERAL.—Subject to subpara-
9 graph (B), in any action under paragraph (1),
10 the plaintiff shall be entitled to recover the ac-
11 tual damages suffered by the plaintiff as a re-
12 sult of the violation, and any profits of the vio-
13 lator that are attributable to the violation and
14 are not taken into account in computing the ac-
15 tual damages. In establishing the violator’s
16 profits, the plaintiff shall be required to present
17 proof only of the violator’s sales, and the viola-
18 tor shall be required to prove all elements of
19 cost or deduction claimed.

20 “(B) STATUTORY DAMAGES.—In any ac-
21 tion under paragraph (1), the plaintiff may
22 elect, at any time before final judgment is ren-
23 dered, to recover, instead of actual damages
24 and profits described in subparagraph (A), an

award of statutory damages for any violation under this section in an amount equal to—

“(i) not less than \$500 and not more than \$100,000, with respect to each type of goods involved in the violation; and

“(ii) if the violation threatens the health and safety of the public, as determined by the court, not less than \$5,000 and not more than \$1,000,000, with respect to each type of goods involved in the violation.

“(4) COSTS AND ATTORNEY’S FEES.—In any action under paragraph (1)—

“(A) in addition to any damages recovered under paragraph (3), a prevailing plaintiff may recover the full costs of the action; and

“(B) the court, in its discretion, may also award reasonable attorney fees to the prevailing party.

“(5) REPEAT VIOLATIONS.—

“(A) TREBLE DAMAGES.—In any case in which a person violates this section within 3 years of the date on which a final judgment was entered against that person for a previous violation of this section, the court, in an action

1 brought under this subsection, may increase the
2 award of damages for the later violation to not
3 more than 3 times the amount that would oth-
4 erwise be awarded under paragraph (3), as the
5 court considers appropriate.

6 “(B) BURDEN OF PROOF.—A plaintiff that
7 seeks damages as described in subparagraph
8 (A) shall bear the burden of proving the exist-
9 ence of the earlier violation.

10 “(6) LIMITATIONS ON ACTIONS.—No civil ac-
11 tion may be commenced under this section later than
12 3 years after the date on which the claimant discov-
13 ers the violation.

14 “(g) ENFORCEMENT ACTIONS.—

15 “(1) IN GENERAL.—The Attorney General and
16 the Secretary of the Treasury shall enforce the re-
17 quirements of this section. In addition, the head of
18 a department or agency of the Federal Government
19 (including the Commissioner of Food and Drugs and
20 the Secretary of Agriculture) may investigate any
21 violation of this section involving a good that is reg-
22 ulated by a provision of law administered by that de-
23 partment or agency.”.

24 (b) CONFORMING AMENDMENT.—The heading for
25 title VIII of the Act of July 5, 1946, is amended by strik-

1 ing “**AND DILUTION**” and inserting “**DILUTION,**
 2 **AND ADULTERATION OF PRODUCT**
 3 **CODES**”.

4 **SEC. 3. CRIMINAL PENALTIES.**

5 (a) IN GENERAL.—Chapter 65 of title 18, United
 6 States Code, is amended by inserting after section 1365
 7 the following:

8 “§ 1365A. Unauthorized modification of product iden-
 9 tification codes

10 “(a) CRIMINAL PENALTIES.—Any person who know-
 11 ingly violates section 43A of the Act of July 5, 1946 (com-
 12 monly referred to as the ‘Trademark Act of 1946’) shall—

13 “(1) be fined under this title, imprisoned not
 14 more than 1 year, or both;

15 “(2) if the total retail value of the good or
 16 goods involved in the violation is greater than
 17 \$5,000, be fined under this title, imprisoned not
 18 more than 5 years, or both;

19 “(3) if the person acts with reckless disregard
 20 for the risk that the health or safety of the public
 21 would be threatened and under circumstances mani-
 22 festing extreme indifference to such risk, and the
 23 violation threatens the health or safety of the public,
 24 be fined under this title, imprisoned not more than
 25 10 years, or both;

1 “(4) if the person acts with reckless disregard
2 for the risk that another person will be placed in
3 danger of death or bodily injury and under cir-
4 cumstances manifesting extreme indifference to such
5 risk and—

6 “(A) serious bodily injury to any individual
7 results, be fined under this title, imprisoned not
8 more than 20 years, or both; or

9 “(B) death of an individual results, be
10 fined under this title, imprisoned for any term
11 of years or for life, or both; and

12 “(5) with respect to any second or subsequent
13 violation, be subject to twice the maximum term of
14 imprisonment that would otherwise be imposed
15 under this subsection, fined under this title, or both.

16 “(b) IMPOUNDING, FORFEITURE, AND DISPOSITION
17 OF GOODS.—

18 “(1) IMPOUNDING.—In any prosecution under
19 this section, upon motion of the United States, the
20 court may—

21 “(A) grant 1 or more temporary, prelimi-
22 nary, or permanent injunctions on such terms
23 as the court determines to be reasonable to pre-
24 vent or restrain the alleged violation; and

1 “(B) at any time during the proceedings,
2 order the impounding, on such terms as the
3 court determines to be reasonable, of any good
4 that is in the custody or control of the defend-
5 ant and that the court has reasonable cause to
6 believe was involved in the violation.

7 “(2) FORFEITURE AND DISPOSITION OF
8 GOODS.—Upon conviction of any person of a viola-
9 tion of this section, the court shall—

10 “(A) order the forfeiture of any good in-
11 volved in the violation that is in the custody or
12 control of the defendant or that has been im-
13 pounded under paragraph (1)(B); and

14 “(B) either—

15 “(i) order the destruction of each
16 good forfeited under subparagraph (A); or

17 “(ii) if the court determines that any
18 good forfeited under subparagraph (A) is
19 not unsafe or a hazard to health, dispose
20 of the good by delivery to such Federal,
21 State, or local government agencies as, in
22 the opinion of the court, have a need for
23 such good, or by gift to such charitable or
24 nonprofit institutions as, in the opinion of
25 the court, have a need for such good, if the

1 manufacturer consents to such disposition
2 and is given the opportunity to recode the
3 good.”.

4 (b) CONFORMING AMENDMENT.—The table of sec-
5 tions for chapter 65 of title 18, United States Code, is
6 amended by inserting after the item relating to section
7 1365 the following:

“1365A. Unauthorized modification of product identification codes.”.

8 **SEC. 4. ATTORNEY GENERAL REPORTING REQUIREMENTS.**

9 Section 2320(f) of title 18, United States Code, is
10 amended—

11 (1) by inserting “criminal tampering with prod-
12 uct identification codes (as defined in section
13 1365A),” after “involve”; and

14 (2) in paragraph (4), by inserting “1365A,”
15 after “sections”.

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